

UNCLAS PARIS FR 00048

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ACTION: UNESCO  
INFO: POL ECON DCM SCI DAO AMBU AMB AMBO

DISSEMINATION: UNESCOX

CHARGE: PROG

APPROVED: AMB:LOLIVER

DRAFTED: DCM:SCENGELKEN

CLEARED: LA:TMPEAY

VZCZCFRI759

RR RUEHC RUCNSCO

DE RUEHFR #0048/01 0141737

ZNR UUUUU ZZH

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FM UNESCO PARIS FR

TO RUEHC/SECSTATE WASHDC

INFO RUCNSCO/UNESCO COLLECTIVE

UNCLAS SECTION 01 OF 06 PARIS FR 000048

SIPDIS

DEPT PASS TO ECA/P/C - MKOROUPAS

SEOUL PASS TO BMCFEETERS

BEIJING PASS TO BZIGLI

TOKYO PASS TO WMMESERVE

E.O. 12958: N/A

TAGS: SCUL UNESCO KPAO KS FR JA

SUBJECT: SEOUL MEETINGS ON THE RETURN OF CULTURAL PROPERTY TO ITS COUNTRY OF ORIGIN (NOVEMBRE 26-28, 2008)

REF: 07 Paris 002594

¶1. Begin Summary. From November 26-28, two international meetings were held in Seoul, South Korea to address the issue of the return of cultural property to its country of origin. On November 26, independent Experts met under the auspices of the Korean Government to review selected case studies of cultural property returns that have occurred in recent years. The Experts also exchanged observations on lessons learned from those returns and exchanged ideas about further steps that can be taken to facilitate more such returns. From November 27-28, UNESCO's Intergovernmental Committee on the Return/Restitution of Cultural Property to its Country of Origin (the "Committee") held its first Extraordinary Session and its only meeting outside of UNESCO headquarters in Paris. Though separate, both sets of meetings were held under the banner of, and in tandem with, the celebration in 2008 of the 30th anniversary of the Committee's existence. The U.S., as a Committee member, was substantially successful in preventing the deliberations of the Experts' meeting from dominating the Committee's agenda of work and its deliberations. Also, importantly, at the closing session the United States (with help from one or two other Committee members) persuaded the Committee to only "take note of" and not to formally "endorse" several proposed initiatives that had emerged from the Experts' meeting. Korean governmental authorities, aided by Korean experts present, exploited their status as host government to repeatedly criticize France and Japan for having failed to return a number of important Korean cultural heritage properties closely linked to Korean national identity. The Committee's next ordinary session is scheduled to take place in Paris in between 11-13 May, 2009. The Committee in principle agreed to consider at its next meeting a U.S.-proposal to have the Committee begin holding ordinary meetings annually rather than bi-annually, as is now the practice. End Summary.

¶2. The United States, joined by other Committee members and also by government representatives of UNESCO Member States not on the Committee (such as Canada, France, Germany and the UK), participated in the Experts' meeting in Observer status. (Mission Legal Adviser, T. Michael Peay, represented the U.S.). At the opening session of that meeting, the Assistant Director-General for Culture, Francoise Riviere said that the Committee was meeting for the first time in its 30-year history in extraordinary session. She clarified for the record that the Experts' meeting was being held

"under the authority of the Government of Korea", not UNESCO, and that the Committee's extraordinary meeting was being held under the joint authority of UNESCO and the Government of Korea (GOK). She clarified further that the conclusions of the Experts' meeting would have no binding effect upon either UNESCO or its Member States. She added that it had been decided in consultation with Korean authorities (after much discussion) to call the Experts' meeting's final outcome document "Conclusions" rather than a "Declaration." This was done to avoid any suggestion that the Experts' document would have normative connotations, she said. Finally, Riviere applauded the holding of Experts meetings such as this and the one held in Athens in March 2008 as forums that offer opportunities for museums, art dealers, academies, and other private expert institutions to discuss and find realistic solutions to requests for the return of cultural property to its country of origin.

¶3. Salient Points from the Experts Meeting: Session One. Generally speaking, the line-up of experts assembled (many of whom were academics) was fairly impressive and their individual presentations were similarly pithy, thoughtful and well-organized, even if at times a bit too far-reaching. Nearly all presentations were done in power-point format, had been pre-printed and were readily available in loose-leaf binders distributed to all participants. Korean Professor LEE, Keun-Gwan opened by referring to an International Plea issued by former-UNESCO Director-General (D-G) M'Bow in 1978 ("the 1978 Plea") which called for the return of cultural properties to their countries of origin. Lee alluded to the Italian Government's return of a fragment of the Parthenon marbles and also to Italy's return of a Venus statue to Libya and to the importance of the 2008 Treaty of Amity, Partnership and Cooperation between those two countries, in this regard. Lee cited as another favorable precedent the return of a cultural object from Japan to South Korea, and then its ultimate rendition by South Korea to North Korea as the country of origin. Professor Lee observed that, during the course of its thirty-year existence, only a very small number of cases of return had been resolved as a result of actions taken by the Committee. However, he noted that the Committee had nonetheless played a supportive role by giving heightened visibility to the overall issue of return.

¶4. Reading from remarks prepared by former D-G M'Bow who could not attend the meeting for health reasons, A/DG Riviere underlined M'Bow's point that the reason he launched the 1978 Plea was not/not "to empty the museums of Europe and America, but rather to allow certain items to be returned that have special cultural significance" to the requesting country concerned. Australian Professor Patrick O'Keefe (a widely revered eminence grise with over 40 years experience in this field) enumerated a list of 10 specific initiatives that he says the Committee should consider taking to enhance the return of such cultural objects. Many of his suggestions were seen as practical in nature, pertinent, and possibly feasible.

¶5. Specifically, Professor O'Keefe suggested that the Committee: (i) monitor more closely and try to reinvigorate the 1999 Code of Ethics for Dealers to ensure that it is being used by dealers; (ii) renew its past discussions and consideration of possibly drafting a Code of Ethics for Collectors based on the principles of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; (iii) renew its commitment to undertake "studies" done by experts "to clarify issues on cultural objects that are disputed and unclear" (noting that to date only one such study has been done); (iv) while working with the World Heritage Committee and others, endeavor to distill a set of general principles which could guide interpretation of the various international instruments regarding the treatment of cultural heritage; (v) prepare educational materials for local people aimed at heightening their awareness of the value of antiquities and monuments as part of their history, including preparing a study of cases where such initiatives have been successfully done; (vi) conduct a study on what legal requirements judicial courts in art market States are demanding before they will declare a claimant State to be the owner of an antiquity; (vii) try to develop a methodology to quantify annually in monetary terms reliable statistical information that can measure the extent of illicit trade in cultural heritage; (viii) conduct a study on the pro's and the con's of disposing of museum duplicates (as a means to reduce illicit traffic), with the objective of establishing an authoritative statement on the issue of duplicates;

(ix) illustrate best practices in establishing inventories of cultural heritage collections, on the theory that good inventories enable collections to be properly managed, are an essential tool in proving the provenance of an object, and assist in the fight against illicit traffic; and finally (x) conduct a study of how tax deduction regimes are applied vis- -vis cultural properties, including whether it must be shown as a precondition for such deductions that the object has not been illicitly exported since 1970.

¶6. One Korean expert, Professor Kim Chang-gyoo noted that the role of mediation under the Committee's auspices is still not well-formulated and needs more detailed guidelines. A Mexican expert, Professor Jorge Sanchez-Cordero, vehemently argued the need for the international community to draft a "model law" on State ownership that could then be used as a common template by States so that their laws in this regard become more harmonious. This would facilitate the judicial and other resolution of disputes relating to cultural heritage objects the ownership of which is claimed by a sovereign State. Sanchez-Cordero stressed that the model law approach had been successfully used in the United States with the Uniform Commercial Code (UCC) to facilitate the resolution of commercial disputes. (Prof. O'Keefe and others found this idea attractive).

¶7. Salient Points from the Experts' Meeting: Session Two. UK Barrister Mr. Norman Palmer (who served as session moderator) asked panelists to bear in mind three questions that could help illuminate and broaden understanding of returns of cultural properties to their countries of origin. Those questions were: (a) What were the "right conditions" that made restitution possible in a given instance, and can those conditions be replicated elsewhere?; (b) What was the process used: diplomatic, unilateral, inter-State; inter-museum?; and (c) What was the document or instrument used to effectuate the return: a gift, a loan, the unconditional ceding of title, an arrangement involving an exchange/swap? Korean Expert Professor Boa Rhee offered a detailed and succinct history of Japanese pillage of Korean cultural heritage dating back to the Japanese invasion of Korea in 1592, then again during the Russo-Japanese War (1904-5), followed by Japan's annexation of Korea (1910) and most recently during the Korean War (1950-53). She noted the repatriation of the Korean Bukgwan Victory Monument as an exceptional but rare example of Japanese repatriation to South Korea of one of its cultural heritage properties. South Korea in turn repatriated that Monument to North Korea.

¶8. Italian Professor Tullio Scovazzi offered two recent examples involving returns of cultural objects by Italy to Libya (a Venus of Cyrene statue) and to Ethiopia (the Axum Obelisk). He asserted that these cases have helped to promote three emerging principles of international law relevant to the return of cultural objects: (i) the principle of the non-impoverishment of the cultural heritage of States of origin; (ii) the principle of non-exploitation of the weakness of other countries to achieve a cultural gain; and (iii) the principle of the preservation of the integrity of cultural, including World Heritage, sites. Scovazzi then offered the provocative idea that the international regime of transnational movements of cultural properties could be better controlled by borrowing certain restrictions and principles found in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. For instance, the Basel Convention prohibits "covert movements" of wastes and "movements without the previous explicit consent of the potentially affected State." It contains other similar constraints and obligations for States parties. GoK Expert, LEE Nan-young, contrasted the United States' return of a precious Korean flag (taken in 1871 before U.S.-Korean diplomatic relations were established) following a negotiation that lasted only one year with Korea's protracted and still unsuccessful attempts to retrieve from France large volumes of imperial archival materials (taken during a French 1866 invasion). Swiss Expert, Prof. Marc-Andre Renold, said that UNESCO has a duty to keep track of all outstanding disputes involving demands for returns of cultural property. Renold endorsed Prof. O'Keefe's list of suggestions and the "model law" idea suggested by Prof. Sanchez-Cordero.

¶9. Salient Points from Experts' Meeting: Session Three. France came in for yet another round of withering criticism for having removed

from Korea the imperial archives of the Emperor Joseon Era. A UNESCO Expert, Etienne Clement, described the loss of Cambodian Khmer statues and other cultural items in connection with the conflict there during the 1970's. Many of those items were later found in U.S. museums and galleries. Major U.S. museums, the U. S. Government (the State Department in particular), and also France, Thailand, and the Netherlands were complimented for playing a constructive role in facilitating or effectuating the return of many of those objects. It was noted that the substantive provisions of the 1970 Convention served as the legal framework for the return of those Cambodian properties. Chinese Government Expert, Zhang Jianxin, set forth in specific detail the Chinese Government's position on issues relating to the return of cultural property to its country of origin. Zhang, referring to "significant cultural objects displaced in history," specifically appealed to "relevant countries, institutions and individuals . . . to return those cultural objects illegally displaced to their countries of origin." He added that museums should "realize they should no longer purchase and collect cultural objects with unknown provenance." During the brief time for questions and answers, a local French diplomat took the floor and launched a spirited defense of France's position on the return of Korean objects. He refuted many of the allegations made, but readily volunteered that because those Korean imperial archives are now part of France's heritage, it will be "impossible under French law to transfer them back to Korea or to send them elsewhere." (Comment: Many delegates later whispered that they found this a shocking admission).

¶10. Discussion re "Experts' Conclusions". At the end of the day, the Experts group began reviewing a draft set of "Conclusions." The U.S. and other government Observer Delegations were permitted to comment on the draft text, but only after it had been largely agreed to by the Experts. The U.S. asked to delete the reference to "discussions taking place on the return of cultural property displaced during World War II", explaining that those discussions were very delicate, that they were taking place under UNESCO auspices and pursuant to other instruments such as the Washington Principles and Vilnius Declaration. (Comment: Our request was intended to emphasize the need to ensure that both expert and Committee meetings do not blur the line between the Committee's mandate regarding the return of cultural property to its country of origin and the on-going discussions taking place regarding cultural property displaced during World War II). Moreover, as currently worded, the Experts Conclusions would leave the erroneous impression that this issue had been discussed at their forum. The Experts evinced a strong reluctance, however, to alter the text of the Conclusions. The U.S. suggestion was not accepted. U.S. concerns, however, were to some degree assuaged in a companion note addressed to the UNESCO Director-General that was signed by the Expert who oversaw the drafting of the Conclusions (Professor Lyndel Prott). That note, published as an integral part of the Conclusions, says "The reference to 'current discussions on the return of cultural property displaced in connection with the Second World War' was intended to include national efforts on spoliation issues as well as international initiatives such as the Washington Principles, Vilnius Declaration and discussions within UNESCO and the Council of Europe."

¶11. Extraordinary Session of the Committee. By acclamation, it was agreed that Korean Professor Lee Keun-Gwan would chair the Committee, and he performed this task very ably throughout. A number of new ideas or noteworthy observations emerged during the Committee's deliberations during the two following days. Japanese expert Professor Toshiyuki Kono discouraged the Committee from becoming more active in dispute mediation/conciliation, pointing out the drawbacks encountered by WIPO in its mediation process (e.g., high cost and non-disclosure of case results). The U.S. agreed that the Committee should be very circumspect about moving the Committee in the direction of greater involvement in conciliation/mediation; any such move in that direction would require very careful consideration. Canada (sitting as an Observer State, represented by the immediately preceding Chairperson of the Committee, Catherine Zedde), however, took a more open view towards conciliation/mediation, though acknowledged that this should not be the Committee's primary focus right now. Egypt complained about the excessively short time delay (3-4 days) between public notices of auctions and the eventual sales and said that the International Code for Dealers should be amended to make the pre-sale interval longer.

The UNESCO Legal Advisor, upon request, opined that the UNESCO General Conference would have the sole authority to amend that Code, as it was the entity that authorized the Code. There were a number of interventions from Committee members (Italy, for one) calling for the draft rules on conciliation/mediation to be finalized and adopted by the Committee.

¶112. Expert, Professor Lyndel Prott noted that most art dealers are either reluctant to use the International Code for Art Dealers or worse they are outright hostile to it. Assistant Director-General, Francoise Riviere said that the Model Export Certificate in use needed to be updated to address illicit sales and exports taking place in today's modern context, including sales consummated on the Internet. Riviere also suggested that the Committee begin directing more of its attention away from the inter-governmental arena and more towards museums and other private actors. (Comment:

This suggestion by a senior UNESCO official underscores the need for Mission and USG vigilance to try to ensure that UNESCO as an international institution does not assume a "big-brother", traffic cop role vis-`-vis the activities of museums and other private actors.) Egypt proposed that greater attention needs to be given to inventorying cultural items that are in storage. Greece gave a summary of the March 2008 Athens Conference on the return of cultural property to its country of origin and stressed two major themes that emerged from that conference: (i) a growing sense of "ethical norms" that transcend legal technicalities and (ii) the importance of ascertaining whether a cultural object whose return is requested is considered as a "sine qua non" of the requesting country's cultural heritage. The U.S. (along with France and Germany sitting as Observer States) opposed Italy's suggestion that the Committee "endorse" the Conclusions adopted at both the Athens Conference and at the Seoul Experts' meeting. Saudi Arabia suggested that the Committee should adopt some of the Seoul Experts' conclusions in one of its Recommendations. After debate, however, it was ultimately agreed to only "take note" of both sets of conclusions (with Japan shown as formally opposing).

¶113. Professor Lyndel Prott presented in power-point format an excellent "Compendium on Historical, Philosophical, and Legal Approaches to Issues of Return and Restitution. One of the more provocative and iconoclastic presenters among the group was Prof. Ana Vrdoljak (U. of West Australia) who discussed "The history and evolution of International Cultural Heritage Law" as it relates to removals and returns of cultural objects. Among some of her recommendations was that the Committee attempt to "codify" international law in this field of activity and that contributions to the Fund of the Intergovernmental Committee be made compulsory. A Kenyan Government expert, Mr. Kiprop Lagat, stated that the Kenyan and other African Governments do not accept as an excuse for non-return that sub-Saharan African museums and local governments cannot properly protect the cultural items that would be returned. He said that Kenya has not yet made any formal demands to the British Museum for return of items, but his use of the term "yet" seemed to imply that this could be envisaged. He noted that some duplicates have been given to Kenya by the UK and he alluded to a 2004 Kenya-UK Memorandum of Agreement to cooperate on loans of cultural property. During a question and answer interval, a heretofore silent representative of the Iran Cultural Heritage, Handicrafts and Tourism Organization piped up to accuse the United States Government of politicizing and holding "hostage to political interests" certain rare Iranian/Persian tablets (a reference to the pending Jenny Rubin civil lawsuit over Persian tablets on loan to the University of Chicago). The U.S. took the floor to correct the erroneous suggestion that the U.S. Government had politicized the claim to those tablets. The U.S. representative pointed out that the Government of Iran itself had apparently sought to politicize that litigation by refusing to respect the U.S. court system and duly making an appearance before court as expected to assert that the tablets were immune from seizure. We noted that after much delay, Iran did properly assert immunity and the matter remains sub judice.

¶114. Committee's Closing Session. Before the Committee turned its discussion to the specific Recommendations proposed for adoption at this session, there was a final round of shadow-boxing between the Koreans, on one side, and the French and Japanese, on the other, concerning certain unreturned items of Korean cultural heritage (discussed above). Korea said it rejected France's invocation of

French domestic law as a basis for refusing to return the archival documents in question, asserting that this violated a basic principle of customary international law. Japan justified its stance by saying that a 1965 Japan-Korean Agreement represented a final and complete resolution of these issues.

¶115. By pre-arrangement with the Chairman, just before closure of the discussion and debate phase of the meeting, the U.S. representative intervened to propose that the Committee consider holding its meetings more regularly, i.e., once a year rather than once every two years, as currently done. (This proposal had been pre-cleared with both the Department and Ambassador Oliver). Many new and important developments are occurring in the field of cultural property returns, we explained, and at its present pace the Committee will always be lagging behind. There was wide support in the room for this idea, including from A/DG Riviere who said the timing of this proposal was good, as her Sector is currently drafting a proposed budget for the next biennium. However, Japan vociferously objected, urging that we keep to the status quo pace of meetings. (The Japanese had previously informed us privately of their fear that more meetings will simply give the Koreans more opportunities to browbeat them in public over non-return issues. However, the Japanese have failed to sufficiently appreciate that their concerns can be better managed within a framework of more frequently-scheduled "regular" meetings of the Committee held at UNESCO headquarters in Paris, which should limit the holding of "extraordinary" meetings like the one in Seoul where host countries can orchestrate their narrow political agendas under the guise of a Committee meeting). The U.S. put forward in writing its draft recommendation asking that this suggestion be placed on the agenda at the Committee's next regular session for discussion. Japan reiterated its strong opposition to more frequent regular meetings, but its line of reasoning became increasingly incoherent, and Japan soon found itself completely isolated. The Chairman reminded Japan of the United States' point that this extraordinary Committee session was not being asked to make a final decision on whether to approve the U.S. suggestion, only that the Committee give this idea consideration at its next meeting. The Chairman noted there was strong support in the room for the U.S. idea. A/DG Riviere then intervened to say that, taking into account the Chairman's favorable observations regarding this proposal, rather than taking additional time at that late hour to debate the final wording on the U.S. recommendation, she would give her personal assurance that the U.S. proposal will be included within the agenda for discussion at the next Committee meeting in May 2009. As the time had come to close the meeting, Japan relented.

¶116. Beyond the issue of frequency of Committee meetings, the U.S. also achieved success in persuading the Committee to delete or modify three other problematic operative paragraphs. We eliminated one paragraph in which the Committee would have affirmed that it "Supports drafting of a model law for the protection of cultural property, to be proposed to States for their consideration, taking into account their specific legislations." We were able to change another to say "Invites States to consider becoming parties to . . . international instruments" rather than "become parties." And, we were able to remove a third paragraph (proposed by Italy) that would have said "Invites the Director-General to prepare a draft document outlining the principles of international law and the procedures to be followed for return of cultural property." The final set of Recommendations, as adopted by the Committee, is available at UNESCO's website.

¶117. Comment. This extraordinary session of the Committee was clearly worth the effort, in terms of its overall substantive value and timeliness. For the United States, the meeting produced a good outcome that had been fortified in advance by two discussions that Ambassador Oliver had had with the Korean Ambassador to UNESCO in which she candidly expressed the substantive and procedural U.S. concerns regarding certain aspects and possible ramifications of the Experts' Meeting. This was a session at which the U.S. needed to have boots on the ground in order to prevent a number of objectionable and potentially dangerous elements from slipping into the Committee's Recommendations and future working methods. U.S. presence also was influential in preventing the Experts' Conclusions from becoming too intrusive vis-`-vis the Committee's deliberations.

The Japanese and French Governments, by contrast, must be far less comfortable with the outcome of this meeting. As UNESCO committees

go, the focus and professionalism of this Committee and its participants are comparatively high and thus give it the potential to make constructive contributions in the field of return of cultural property to its country of origin. Though there may be further resistance, there is a good chance the Committee will agree to adopt the U.S. proposal to begin meeting annually. It is highly likely that, as part of the Committee's consideration of "a strategy for [its] future work", it will gradually begin studying and then implementing some of the innovative ideas that emerged from the Experts' meeting. It is clear that, as a result of what the United States is doing at the federal level (specifically, the State Department and Homeland Security), the U.S. is currently seen in a favorable light both within the Committee and by other stakeholders in this field. Indicative of this was the strong support that Peru openly provided in support of nearly each U.S. intervention.

¶18. Comment cont'd. As the issue of cultural property returns continues to gain greater visibility and the number of requests for returns continues to grow, the Committee will likely be asked to play an increasingly prominent role, including in the areas of mediation/conciliation and standard setting. Moreover, it has become unmistakably clear that the issue of the return of cultural property to its country of origin is braced to become more political and more contentious in the period ahead. Accordingly, continued U.S. leadership on this issue at UNESCO and U.S. monitoring of the Committee's activities will be key to managing that process.  
End Comment.

Oliver